In the Supreme Court of the United States

OCTOBER TERM, 1941

No. .....

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Support of Petition for Writ of Certiorari

DATE OF JUDGMENT OF TRIAL COURT.

The judgment of the trial court was rendered on June 13, 1940. (C. T. 129.)

(Note: All italics appearing in this brief, unless otherwise noted, have been supplied by the writer.)

OPINION OF THE DISTRICT COURT OF APPEAL.

The opinion of the respondent District Court of Appeal was rendered and filed on May 2, 1941, reported in the California advance decisions in 44 A. C. A. 687, and became final on May 29, 1941, upon the order of the Supreme Court of California denying a hearing by that court.

JURISDICTION AND STATEMENT OF FACTS.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code of the United States; U. S. C. A. Title 28, Sec. 344, subdivision b.

The grounds on which the jurisdiction of this Court attaches and the statement of the facts, pursuant to Rule 12 of this Court, are fully set forth in the petition filed herein.

SPECIFICATION OF ERRORS

1. Respondent court erred in holding that Section 4 of the California Health & Safety Code (Cal. Stats. 1939, p. 483) was valid and saved prosecutions theretofore commenced under the repealed Section 1-d of the State Narcotic Act. (Cal. Stats. 1929, Ch. 216, p. 380, as amended by Stats. 1933, Ch. 216, p. 380.) Said purported saving clause in the Health & Safety Code is void as being in violation of the equal protection of the laws clause of the Fourteenth Amendment and also of the due process clause of said Amendment, as

making an arbitrary and unjust discrimination between people of the same class who had violated the State Narcotic Act, by subjecting those to prosecution and punishment against whom an accusation had been filed prior to September 19, 1939, and giving immunity to those against whom no such accusation had been filed prior to said date. The respondent court recognized but failed to pass upon this constitutional question.

2. Respondent court denied to petitioner the rights guaranteed to him under the due process clause and equal protection of the laws clause of the Fourteenth Amendment by holding that the great principle of justice embodied in the doctrine of *res judicata,* while applicable to criminal cases, was not available to petitioner in a prosecution against him for perjury.

ARGUMENT.

I.

THE PURPORTED SAVING CLAUSE OF THE CALIFORNIA HEALTH AND SAFETY CODE VIOLATES THE FOURTEENTH AMENDMENT.

The importance of this point appears from the following facts: The charges, in the present indictment, of which petitioner was convicted, arose out of a trial in the Municipal Court of San Francisco, based on violations of Section 1-d of the California Narcotic Act. He was accused of the offenses of perjury, offering and preparing false evidence at this *first trial*

which was held from September 26 to October 5, 1939. The Health and Safety Code became effective on September 19, 1939, and contained, as hereafter pointed out, a repeal of the entire State Narcotic Act. If there was no valid saving clause in the Health and Safety Code, preserving prosecutions for violation of the repealed Narcotic Act, then there could not have been any crime of perjury or preparing or offering false evidence at the purported trial for violating the Narcotic Act, as said trial occurred after the effective date of the repeal of such Act.

(a) Neither perjury nor offering false evidence can be committed in a trial over which the court has no jurisdiction. Both a valid judicial trial and a valid issue must exist before either such offense can be committed.

Perjury cannot be charged on a false oath in a proceeding before a court which had no jurisdiction to try the offense which was the subject of that proceeding.

Before the giving of any evidence can constitute perjury or the offense of offering false evidence be committed at a trial, it is necessary that the proceeding in which either such act occurs be a "judicial trial", *i. e.*, a trial which the court had jurisdiction to conduct. It is only in such a trial that a "valid issue" can be involved and it is only where a valid issue is involved that any evidence, oral or documentary, can be deemed material. It is only material evidence that can form the basis for either such offenses.

The general rule is correctly announced in Corpus Juris as follows:

> "In the absence of some statute changing or modifying the rule, it is well settled that to constitute the crime of perjury or false swearing it is essential that the false statement be made in a proceeding or with respect to a matter within the jurisdiction of the court, tribunal, or officer before or by whom the matter may be considered. It must further appear * * * that the tribunal or officer was competent to act."
>
> 48 *Corpus Juris,* Sec. 61, p. 847.

In *Wharton's Crim. Law* (11th Ed.), Vol. II, Sec. 1536, the author states:

> "A suit which is actually void and null from want of jurisdiction or other incurable defect is not one in which perjury can be committed. Thus it is not perjury to swear falsely in a discontinued or abated suit."

California Jurisprudence states the rule as follows:

> "A charge of perjury may be predicated upon an oath taken in the course of a judicial proceeding, *provided the court had jurisdiction."*
>
> 20 *Cal. Jur.* p. 1008, Sec. 5.

> "As was the rule at common law, to constitute perjury under the code it must appear that the matter falsely sworn to was material to a valid issue in the proceeding in which the statement was made. *Thus matter sworn to before an officer or tribunal not having jurisdiction of the proceed-*

*ing in which the oath is taken * * * cannot furnish a foundation for a charge of perjury."*

20 *Cal. Jur.* p. 1012, Sec. 8.

The California cases have invariably followed the foregoing rule.

In re Clark, 54 Cal. App. 507;
People v. Howard, 111 Cal. 655, 658;
People v. Teixeira, 59 Cal. App. 598.

The repeal of a statute, without any valid saving clause, divests the courts of any jurisdiction to try one for a violation thereof committed before such repeal. The effects of such repeal are: (a) If no accusation, complaint, etc. has been filed, none can be filed; (b) if a complaint has been filed, no trial can be had thereon; (c) if a trial has been had and defendant found guilty, no judgment can be pronounced. In other words, *such repeal of a criminal statute divests the court of jurisdiction at the very point reached in the proceedings at the time of the repeal.*

> "* * * it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter. 'The repeal of a statute puts an end to all prosecutions under the statute repealed and to all proceedings growing out of it pending at the time of the repeal.' (citing authorities.) * * * *The proceeding is arrested at the very point where it is at the date of the repeal;* if before indictment

no indictment can be found; if after indictment, and before trial, no conviction can be had; if after conviction and before judgment, no judgment can be rendered. * * * If, during the interim, the legislature repeals the statute under which the prosecution is had it operates as a discharge of the defendant."

Spears v. County of Modoc, 101 Cal. 303, 305.

See also

Harkelroad v. Commonwealth (Ky.), 269 S. W. 724.

Appellant was charged, on August 30, 1939, with violating the State Narcotic Act. On September 19, 1939, the Narcotic Act was repealed. As we will next point out, there was no valid saving clause that operated to keep alive prosecutions for offenses committed under the Narcotic Act. It follows, that on such repeal the jurisdiction of the Municipal Court to proceed with the trial of such charges ceased to exist. As the Municipal Court had no jurisdiction to conduct such trial no evidence given thereat could be perjury nor the introduction of fabricated records an offense.

(b) The State Narcotic Act was repealed on September 19, 1939.

The State Narcotic Act, under which the two Municipal Court prosecutions against appellant were based, was enacted in 1929 (Stats. 1929, Ch. 216, p. 380), and was thereafter amended at each legislative session to and including that of 1937.

The Health and Safety Code was approved on April 7, 1939, and went into effect on September 19, 1939.

(Stats. 1939, Ch. 60, p. 483.) Sec. 40002 of the Health and Safety Code reads in part as follows:

> "40002. General Laws. The following acts and portions of acts, together with all acts amendatory thereof and supplementary thereto, are hereby repealed: * * * 1929: 216: 380 All."

Thus on September 19, 1939, the State Narcotic Act was repealed in its entirety and all violations thereof ceased to be a matter of criminal prosecution or trial, unless there was a valid saving clause allowing such prosecutions to be thereafter conducted.

(c) The saving general clause contained in Section 329, Political Code, does not apply to misdemeanors triable in the Municipal Court.

Section 329 of the California Political Code, since its last amendment in 1881, reads as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the *indictment or information* and punishment of an act already committed in violation of the law so repealed, unless the intention to bar *such indictment or information* and punishment is expressly declared in the repealing act."

The foregoing section does not apply to misdemeanors which are prosecuted by the filing of a *complaint* in a court inferior to the superior court.

> "The words 'indictment' and 'information' as used in the criminal laws of this as well as other jurisdictions have acquired and been accorded a very precise definition. They have been applied to

proceedings for the prosecution of felonies in courts of record and have never been given application to mere misdemeanors, the prosecution of which is initiated by the filing of complaints in the lower tribunals * * *"

In re Page, 214 Cal. 350, 354.

(d) The purported saving clause in Section 4 of the Health and Safety Code is unconstitutional and void.

When the legislature enacted the Health and Safety Code, it attempted to put a saving clause therein reading as follows:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible."
>
> *Health & Safety Code*, Section 4.

So far as pertinent to this case, the foregoing section provides two different things, viz.:

(a) If a person has committed a misdemeanor by violating the State Narcotic Act and *a complaint was filed against him before September 19, 1939*, then the prosecution for such misdemeanor can be carried on through trial and judgment after the repeal of the Narcotic Act became effective; but

(b) If another person has also committed the same violation of the State Narcotic Act and *no complaint was filed against him before September 19, 1939*, then such person cannot be prosecuted for having committed such misdemeanor.

In other words, if fifty people, all standing in the same relation to the law, all pursuing the same calling, should all have committed the misdemeanor of not keeping the records prescribed by Section 1-d of the Narcotic Act and, prior to September 19, 1939, complaints had been filed against 25 of the people and no complaints had been filed against the others, then the latter 25 would be pardoned their transgressions and could not be prosecuted therefor while the former 25 would be subject to prosecution and punishment.

The purported saving clause therefore is in direct violation of the two clauses of Section 1 of the XIV Amendment to the Constitution of the United States, providing: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

We freely concede that the foregoing constitutional provisions do not require the legislature, in every case, to make our laws apply to all persons within our state boundaries. We know that the legislature, in enacting laws, can make classifications of the people; but such right cannot be arbitrarily exercised. The right of the legislature to so classify the people can only be exercised where there is some natural, constitutional or intrinsic distinction between those chosen as the subject of any legislation and those not affected thereby. When such a lawful classification has been made the legislature cannot go further and again divide the class selected into arbitrary

divisions and confer benefits on some and cast burdens on others. Where the people of the selected class all occupy the same position and stand in the same light before the law, all of such people must be treated identically the same by the law.

The foregoing principles have been judicially announced time and again.

> "The legislature may, without violating the constitutional provision above quoted, classify subjects either of regulation or of procedure and enact laws applicable to all within the same class, *provided of course, that such laws apply 'equally to all persons embraced in a class founded upon some natural or intrinsic or constitutional distinction'* and do not confer 'particular disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.' (*City of Pasadena v. Stimson,* 91 Cal. 238, 251 [27 Pac. 604, 607].)"
>
> *City of Los Angeles v. Oliver,* 102 Cal. App. 299, 320.

"And, furthermore, lest by such enactments, the constitutional inhibition against, special legislation may be violated, it is the rule that, *in the passage of laws designed to operate upon a particular class only, there must be no arbitrary discriminations between parties standing in the same relation to the subject of such law,* and that if, by such laws, discriminations are made, then the legislation will fall under the force of the consti-

tutional mandates against special enactments. (*Ex parte King,* 157 Cal. 161 [106 Pac. 578], and cases therein cited.) And in that case it is further said: 'If it [the law] operates uniformly upon all members of such class, it necessarily has the 'uniform operation' required by Section 11 of article I of the constitution."

City of Sacramento v. Swanston, 29 Cal. App. 212, 218.

The purpose and effect of the Fourteenth Amendment has been announced by this Court as follows:

" 'The question of constitutional law to which we have referred (the equal protection of the laws) cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. "The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law." The state has

undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial of persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.' "

Dobbins v. Los Angeles, 195 U. S. 223, 237, 49 L. Ed. 169, 175.

"The 14th Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoilation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy properties; that they should have like access to the courts of the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or

higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. Ed. 923, 924;

Magoun v. Illinois Bank, 170 U. S. 283, 293, 42 L. Ed. 1037, 1042.

Let us pause and apply the foregoing principles to the facts in issue.

Section 1-d of the State Narcotic Act, before its repeal, provided that "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs" should keep a record of the address of the person to whom issued or dispensed, the date when issued, etc. This record had to be kept for two years. Violation of its terms was a misdemeanor.

Every dispenser of narcotics and every doctor who writes prescriptions therefor occupies exactly the same place in relation to the law. If several fail to keep the record prescribed, each is equally but no more guilty than the other. The duty resting on each is the same. The wrong doing by each is equal. If one should be punished all should be punished. If some are granted immunity, all should be granted immunity.

Under the purported saving clause no such equality can be found. An arbitrary distinction is made, not based on any natural, intrinsic or constitutional difference, between those against whom complaints have been filed and those who have not been complained

against. The provisions of the law operate with full vigor against the first and give complete immunity to the second class.

The purported saving clause therefore violates the Fourteenth Amendment and is void.

(e) The reasons given for the validity of the saving clause, by respondent court, are erroneous.

The respondent court, declining to pass on the constitutional question raised, upheld the continuation of prosecutions based on the repealed Narcotic Act by resort to Section 2 of the Health and Safety Code, reading as follows:

> "The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments." (Cal. Stats. 1939, Ch. 60, p. 483).

There is no provision of the Health and Safety Code which is substantially the same as Section 1-d of the repealed Narcotic Act.

Section 1-d of the Narcotic Act was added by Cal. Stats. 1933, Ch. 216, p. 380. This amendatory Act was expressly repealed by Section 40002 of the Health and Safety Code, quoted above.

Section 1-d of the Narcotic Law read as follows:

> "Every person authorized by law to issue a prescription or administer or dispense narcotic drugs as mentioned in this act shall preserve for

a period of not less than two years a record of the name and address of the person to whom, the date when, the character and quantity of the drug prescribed, or administered or dispensed, and the purpose for which each prescription was issued * * *"

The only provision of the Health and Safety Code involving the same matter is Section 11225, which reads:

"Every person who issues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows *all* the following: (a) The name and address of the patient. (b) The date. (c) The character and quantity of narcotics involved. (d) *The pathology* and purpose for which the prescription is issued * * *"

Thus, the Health and Safety Code provision is not substantially the same as the old Section 1-d of the Narcotic Act. It adds a new element to the offense, viz: the pathology. A doctor who prescribed narcotics and kept a record of everything required by the Narcotic Act would violate the Health and Safety Code, as under the former law he did not have to include the pathology of the patient while under the new law the failure to include such pathology would render the doctor guilty of a misdemeanor.

The reasoning of respondent court is erroneous. The offenses defined in the first and second act are composed of different elements and, therefore, one is not a substantial re-enactment of the other.

Where a question under the Federal Constitution is involved, this court is not bound by the construction of a state statute by a state court but can construe such statute as it should be construed in conformity to law and justice. (See: *Yick Wo v. Hopkins,* 118 U. S. 356, 366; 30 L. Ed. 220, 225.)

II.

THE HOLDING THAT THE DOCTRINE OF RES JUDICATA HAS NO APPLICATION TO PROSECUTIONS FOR PERJURY, DENIES RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioner was tried and acquitted in the first municipal court trial, at which he offered in evidence the Black and Brandon cards as proof that he kept the records required by the Narcotic Act. New charges were filed against him for failure to keep such records and at this trial he again offered in evidence the *same* cards and testified that the entries thereon were true and correct. At this second municipal court trial the verity of the two cards was directly in issue, expert testimony was offered by both sides, the court instructed the jury that the question for it to determine was the verity of these cards, and they found the cards to be true and correct, not false or fabricated, by acquitting the petitioner. Petitioner was then tried and convicted of perjury and offering false evidence, at the *first* municipal court trial, the perjury consisting in his testimony that the entries on the

cards were correct and the offering of false evidence being the offering of the cards.

Before the trial of the perjury and kindred offenses, the question of the verity of the two cards had been conclusively determined, between petitioner and the State of California, in the second municipal court trial. Throughout the felony trial, petitioner constantly maintained that the issue was *res judicata* and that the verdicts in the second municipal court trial were conclusive evidence, *i.e.* evidence that the law did not permit to be contradicted, as to the verity of the cards. Of course, if the cards were true and correct petitioner's testimony relative thereto was also true and correct.

The respondent court held that while *res judicata* applied to criminal cases it did not apply to prosecutions for perjury. This holding denied to petitioner due process of law and equal operation of the laws as guaranteed to him under the Fourteenth Amendment.

No question is raised in the decision, nor was it raised by the State, as to the applicability of the doctrine of *res judicata* to criminal cases. That such is the general rule has been repeatedly stated by this and the California courts. We merely cite the cases so holding:

Coffey v. United States, 116 U. S. 436; 29 L. Ed. 684;

Frank v. Mangum, 237 U. S. 309, 333; 59 L. Ed. 969, 983;

People v. Frank, 28 Cal. 507, 515;
People v. Mojado, 22 Cal. App. (2d) 323;
People v. Ashrawy, 130 Cal. App. 145;
People v. Kovacevich, 19 Cal. App. (2d) 335.

The lower court makes an exception to the foregoing general rule and holds that *res judicata* has no application to prosecutions for perjury. In so doing the lower court makes no distinction between the following cases:

(1) Where the judgment of acquittal in the very trial in which the perjury is alleged to have occurred is offered as *res judicata* of the truth of the accused's testimony, and (2) Where an accused is first prosecuted for not keeping records and at such trial he is acquitted on his production of records and his testimony that they are true and correct. Following such trial he is again charged with not keeping records, he again offers the *same records* and testifies that they are true and correct. The prosecution attacks the verity of the offered records, produces experts to testify as to the falsity and fabrication, contrary evidence is introduced by the defense, the issue of the verity of the records submitted by the court to the jury for determination, the jury acquits the defendant thus finding the records to be true and correct. Following this second trial, the defendant is prosecuted for perjury and offering false evidence (the records) *at the first trial,* he offers the acquittals at *the second trial* as being *res judicata* on the question of the verity

of the records and *does not rely on the acquittal in the first trial.*

Manifestly a clear distinction exists between the two foregoing cases. Conceding, for argument's sake, that where a defendant procures his acquittal on perjured testimony, he cannot rely on the acquittal as a defense to the perjury committed in the self-same trial, it being against public policy to allow the defendant to profit by his own wrong; nevertheless a different rule must prevail where the very issue of the truth of such testimony (or verity of such physical evidence) is directly litigated, submitted to a jury and determined in favor of the defendant *at a trial occurring subsequent to the one in which the perjury is alleged to have been committed and before the trial for such perjury.*

The lower court cites no case holding that *res judicata* does not fully operate in the latter of the above cases.

Every case cited by the respondent court involved a state of facts where the defendant relied on the acquittal procured in the very trial wherein the claimed perjury occurred.

The conclusive effect of a prior judgment between the same parties has been stated by this court in *Coffey v. United States*, 116 U. S. 436, 29 L. Ed. 684:

> "This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory

punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in unanimous opinion of the Judges in the case of *Rex v. Duchess of Kingston,* 20 Howell St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea a bar, or as evidence conclusive, between the same parties, upon the matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court, and had jurisdiction; and the judgment was directly on the point now involved and between the same parties."

In *Frank v. Mangum,* 237 U. S. 309, 333, 59 L. Ed. 969, 983, the Supreme Court, in a criminal cause, again stated the rule:

> "It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and determined by a court of competent jurisdiction cannot afterwards be disputed between the parties"

And such has always been the rule in California:

Estate of Clark, 190 Cal. 354, 360;
Todhunter v. Smith, 219 Cal. 690, 695;
Sutphin v. Speik, 15 Cal. (2d) 195, 201.

In fact the *res judicata* doctrine has been incorporated in the statute law of California wherein it is declared such prior adjudication is *conclusive evidence* as to the fact adjudicated.

Section 1908 of the California Code of Civil Procedure provides:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, *conclusive* between the parties * * *"

Section 1837 of the same Code of Civil Procedure reads:

> "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it."

The holding of respondent court thus places a construction, for the first time, upon the foregoing statutes whereby the equal operation and protection thereof are denied to those persons who may be prosecuted for perjury.

The doctrine of *res judicata* is one of those fundamental principles of justice which the Fourteenth Amendment protects from any deprivation thereof by state action.

The character of this doctrine has been announced by this court in the following cases to be: "*A fundamental principle of justice.*"

United States v. Oppenheimer, 242 U. S. 85, 88; 61 L. Ed. 161, 164;

Collins v. Loisel, 262 U. S. 426, 430; 67 L. Ed. 1063, 1064.

In the most recent decisions of this court it has unequivocally been held that any state action denying an accused in a criminal case any fundamental principles of justice, constitutes a denial of due process of law as embraced within the Fourteenth Amendment.

> "The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions' (Hebert v. Louisiana, 272 U. S. 312, 316 71 L. ed. 270, 272, 48 A. L. R. 1102, 47 S. Ct. 103), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment * * *"

Powell v. Alabama, 287 U. S. 45, 67; 77 L. Ed. 158, 169.

To the same effect are the cases of:

Mooney v. Holohan, 294 U. S. 103; 79 L. Ed. 791;

Brown v. Mississippi, 297 U. S. 278; 80 L. Ed. 682;

Chambers v. Florida, 309 U. S. 227; 84 L. Ed. 716.

Res judicata is a doctrine that falls within the classification of "fundamental principles of justice." It is, therefore, a principle protected by the Fourteenth Amendment. A denial of this right constitutes state action contrary to the constitutional provision and renders void any judgment of conviction based upon the denial of such right.

We have argued this matter upon the assumption that the respondent court's conclusion is sound that the doctrine does not apply to those cases of perjury where the judgment of acquittal relied on, in support of the doctrine, was rendered in the very case where the alleged perjury is claimed to have occurred. In doing so we have pointed out that the instant case is not of such a character, the judgment in the first municipal court trial is not the one relied on by petitioner.

However, there is respectable authority to the contrary of the doctrine announced by respondent court.

> "If the accused was acquitted of the prior charge, as the excluded court records showed, the issue of guilt was conclusively settled against the government for every purpose, and could not again be drawn in question as a makeweight in another prosecution. A person acquitted of a crime cannot be again tried for it under the guise of a charge of perjury."
>
> *Chitwood v. United States* (C. C. A. 8) 178 Fed. 442;
>
> *United States v. Butler,* (D. C.) 38 Fed. 498.

Where the issue of truth or falsity has been determined in a trial intervening between the one in which the perjury is alleged to have occurred and the trial for such perjury, the doctrine of *res judicata* applies in all its force. Such was the holding in

Commonwealth v. Spivey, (Ky.) 48 S. W. (2d) 1076.

We submit that in depriving petitioner of the benefit of the doctrine of *res judicata* he was deprived of a right guaranteed to him under the Fourteenth Amendment.

No question is involved as to whether the facts disclosed by the record at the second municipal court trial were sufficient to support a plea of *res judicata*. This stands admitted by the record. Respondent court avoided the operation of the doctrine by holding it inapplicable to perjury prosecutions. This results in an unequal application of the law.

III.

CONCLUSION.

It follows that petitioner was convicted solely as the result of his being denied rights guaranteed to him under the Fourteenth Amendment. He was denied both due process of law and the equal protection and

operation of the laws. This being so his conviction was void.

Respectfully submitted,

LEO R. FRIEDMAN,
Attorney for Petitioner.

Dated: San Francisco,
August 21, 1941.